United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1541–10 OF 2020
LEE SWEE SENG, RAVINTHRAN AND SEE MEE CHUN JJCA
3 AUGUST 2021

Civil Procedure — Stay of proceedings — Forum non conveniens — Appellant filed application to stay proceedings on ground Malaysia was not proper forum for dispute — Jurisdiction clause in loan agreement — Whether clause was exclusive jurisdiction clause — Whether appellant submitted to Malaysian courts jurisdiction — Rules of Court 2012 O 12 r 10(2)

This was an appeal by the appellant, United Overseas Bank Ltd Singapore ('UOB') against the decision of the High Court judge ('HCJ') in dismissing its application for a stay of the High Court proceedings ('USSB suit') filed by the first respondent ('USSB') pending the final disposal of an originating summons filed by UOB in Singapore ('Singapore OS'). The stay proceedings was premised on O 12 r 10(2) of the Rules of Court 2012 on the ground that Malaysia was not the proper forum for the dispute, rather it was Singapore. Pursuant to a loan agreement ('the loan agreement'), UOB granted a loan to USSB ('the loan') and as security for the loan, USSB granted a deed of debenture ('the debenture') charging all of its assets to UOB. The assets included all of USSB's 2,500,000 ordinary shares in CCSB then known as City Centre Bhd ('the CCSB shares'). The CCSB shares were registered in UOB nominees as required under the debenture. When USSB defaulted in repayment of the loan, UOB exercised its rights under the debenture and appointed receivers over the charged assets of USSB. USSB was then wound up. CCSB too was wound up and its lands were sold by the liquidators. There was a liquidation surplus of RM434m ('the surplus proceeds'). The CCSB liquidators filed an application for directions under s 237(3) of the Companies Act 1965 on the distribution of the surplus proceeds, namely whether UOB nominees was the sole contributory of CCSB and if affirmative whether the surplus proceeds may be forwarded to it to apply the surplus based on the legal entitlement under the relevant security documents. The respondents to the application for directions were UOB nominees, USSB and Equiticorp. USSB and Equiticorp were then the unsecured creditors of CCSB and the debts had been fully paid by the CCSB liquidators. The High Court directed the surplus proceeds to be paid to UOB nominees. On appeal, the Court of Appeal allowed the appeal by USSB and Equiticorp. However, leave to the Federal Court was refused. USSB thus filed this suit essentially seeking declarations that the surplus assets did not form part of the assets of USSB subject to the loan

agreement and/or the debenture; UOB and/or UOB nominees had not established a legal entitlement to the surplus proceeds, UOB nominees was not a contributory of CCSB such as to be eligible to receive the surplus proceeds without establishing a legal entitlement to the same and other consequential relief. UOB filed its Singapore OS essentially seeking orders and/or reliefs that under Singapore law all of UOB's rights under the debenture were valid and exercisable including its security over all rights attached to the shares of CCSB; and, under the Singapore law UOB's security over all rights attached to the shares of CCSB pursuant to the debenture includes security over the right to the surplus proceeds. Hence, the stay application by UOB.

Held, allowing the appeal:

(1) The non exclusive jurisdiction clause meant that only UOB had the option to refer to other jurisdictions but not USSB. Such an interpretation was fortified by cl 25.6 of the loan agreement wherein if UOB had selected Singapore as the forum, USSB irrevocably waived any claim that the venue so selected was not a convenient forum. UOB had the option to sue elsewhere but not USSB. Such an option was intentionally omitted from USSB which entailed it being obligated to refer to the Singapore courts. Clause 25 being an exclusive jurisdiction clause and the waiver of objection to Singapore as the proper forum to hear any dispute would for all intent and purpose make it clear that as a matter of contractual obligation, the submission to the jurisdiction of the Singapore courts should not be challenged. The Singapore courts in applying the law of the contract which was the laws of Singapore would be best positioned to hear the dispute (see paras 22, 25 & 39).

(2) The HCJ found that UOB had submitted to the jurisdiction of the Malaysian courts in CCSB's winding up proceedings through UOB nominees. However, the application for directions filed by CCSB liquidators was served on UOB nominees as a respondent following from which UOB nominees was compelled to defend its right, as the sole shareholder/contributory of CCSB, to the surplus proceeds. The USSB suit and the CCSB winding up stood on different footing. In the winding up and the application for directions, the issue of CCSB indebtedness and the distribution of the surplus proceeds to UOB nominees was to be resolved. The USSB suit concerned USSB indebtedness to UOB vis a vis the loan agreement and the debenture. CCSB was not a party to the loan agreement and the debenture. In fact CCSB and its liquidators had pleaded in their defence to the USSB suit they were nominal defendants. Further, submission to jurisdiction must be by a clear and unequivocal consent (see paras 41–42 & 44–45).

(3) All the defendants did not have any objection to the stay application other than Equiticorp. Equiticorp was then an unsecured creditor of

CCSB and the debts had been fully paid by the CCSB liquidators. Hence all the defendants in the USSB suit could not be said to be prejudiced by not being made parties to the Singapore OS. The disputes in the Singapore OS and the USSB suit only concerned USSB and UOB and not the other defendants in the USSB suit as they were not parties to the loan agreement and the debenture. Hence the stay could not possibly prejudice them, more so, due to the position taken by them (see paras 52–55).

(4) Even if the Singapore OS could not be enforced in Malaysia due to it being a non monetary judgment, it could not negate the fact that the Singapore judgment could be recognised by the courts here due to the exclusive jurisdiction clause. This was particularly so where what was being sought in the OS were the same as that in the USSB suit. Clause 25.2(c) of the loan agreement provided that a final judgment of the Singapore court shall be conclusive and binding and shall be conclusive evidence of the fact and of the amount of USSB's indebtedness (see para 56).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu, United Overseas Bank Ltd Singapore ('UOB') terhadap keputusan hakim Mahkamah Tinggi ('HCJ') yang menolak permohonannya untuk menangguhkan prosiding Mahkamah Tinggi ('saman USSB') yang difailkan oleh responden pertama ('USSB') sementara menunggu pelupusan akhir saman pemula yang difailkan oleh UOB di Singapura ('OS Singapura'). Prosiding penangguhan itu dibuat berdasarkan A 12 k 10(2) Kaedah-Kaedah Mahkamah 2012 atas alasan bahawa Malaysia bukanlah forum yang sesuai untuk pertikaian itu, sebaliknya Singapura. Menurut perjanjian pinjaman ('perjanjian pinjaman'), UOB memberikan pinjaman kepada USSB ('pinjaman') dan sebagai jaminan untuk pinjaman itu, USSB memberikan surat ikatan debentur ('debentur') yang mencagarkan semua asetnya kepada UOB. Aset tersebut termasuk kesemua 2,500,000 saham biasa USSB dalam CCSB yang dikenali sebagai City Centre Bhd ('saham CCSB'). Saham CCSB telah didaftarkan dalam penama UOB seperti yang diperlukan di bawah debentur. Apabila USSB ingkar dalam pembayaran balik pinjaman, UOB melaksanakan haknya di bawah debentur dan melantik penerima ke atas aset yang dicagar USSB. USSB kemudiannya digulung. CCSB juga telah digulung dan tanahnya dijual oleh pelikuidasi. Terdapat lebihan likuidasi sebanyak RM434 juta ('lebihan bersih'). Pelikuidasi CCSB memfailkan permohonan untuk arahan di bawah s 237(3) Akta Syarikat 1965 mengenai pengagihan lebihan bersih, iaitu sama ada penama UOB adalah penyumbang tunggal CCSB dan jika benar sama ada lebihan bersih boleh diberikan kepadanya untuk menggunakan lebihan berdasarkan kelayakan undang-undang di bawah dokumen jaminan yang berkaitan. Responden kepada permohonan arahan adalah penama UOB, USSB dan Equiticorp.

USSB dan Equiticorp ketika itu merupakan pemiutang tidak bercagar CCSB dan hutang telah dibayar sepenuhnya oleh pelikuidasi CCSB. Mahkamah Tinggi mengarahkan lebihan bersih itu dibayar kepada penama UOB. Semasa rayuan, Mahkamah Rayuan membenarkan rayuan oleh USSB dan Equiticorp. Bagaimanapun, kebenaran kepada Mahkamah Persekutuan telah ditolak. Oleh itu, USSB memfailkan saman ini pada dasarnya untuk mendapatkan pengisytiharan bahawa lebihan aset tidak menjadi sebahagian daripada aset USSB tertakluk kepada perjanjian pinjaman dan/atau debentur; penama UOB dan/atau UOB tidak membuktikan kelayakan undang-undang untuk lebihan bersih, penama UOB bukanlah penyumbang CCSB yang layak menerima lebihan bersih tanpa membuktikan kelayakan undang-undang untuk relif berbangkit yang sama dan lain-lain. UOB memfailkan OS Singapura pada dasarnya untuk mendapatkan perintah dan/atau relif bahawa di bawah undang-undang Singapura semua hak UOB di bawah debentur adalah sah dan boleh dilaksanakan termasuk jaminannya ke atas semua hak yang dilampirkan pada saham CCSB; dan, di bawah undang-undang Singapura jaminan UOB ke atas semua hak pada saham CCSB menurut debentur termasuk jaminan ke atas hak untuk lebihan bersih. Oleh itu, permohonan penangguhan oleh UOB.

Diputuskan, membenarkan rayuan:

(1) Klausa bidang kuasa tidak eksklusif bermakna hanya UOB mempunyai pilihan untuk merujuk kepada bidang kuasa lain tetapi bukan USSB. Tafsiran sebegitu diperkukuh oleh klausa 25.6 perjanjian pinjaman di mana jika UOB telah memilih Singapura sebagai forum, USSB mengetepikan sebarang tuntutan bahawa tempat yang dipilih itu bukanlah forum yang sesuai. UOB mempunyai pilihan untuk menyaman di tempat lain tetapi bukan USSB. Pilihan sedemikian sengaja ditinggalkan daripada USSB yang menyebabkan ia diwajibkan merujuk kepada mahkamah Singapura. Klausa 25 sebagai klausa bidang kuasa eksklusif dan penepian bantahan terhadap Singapura sebagai forum yang sesuai untuk mendengar apa-apa pertikaian akan untuk semua maksud dan tujuan menjelaskan bahawa sebagai soal kewajipan kontrak, penyerahan kepada bidang kuasa mahkamah Singapura tidak seharusnya dicabar. Mahkamah Singapura dalam menggunakan undang-undang kontrak yang merupakan undang-undang Singapura akan berada pada kedudukan terbaik untuk mendengar pertikaian tersebut (lihat perenggan 22, 25 & 39).

(2) HMT mendapati bahawa UOB telah menerima bidang kuasa mahkamah Malaysia dalam prosiding penggulungan CCSB melalui penama UOB. Walau bagaimanapun, permohonan arahan yang difailkan oleh pelikuidasi CCSB telah disampaikan kepada penama UOB sebagai responden berikutan penama UOB perlu mempertahankan haknya, sebagai pemegang saham

tunggal/penyumbang CCSB, kepada lebihan bersih. Saman USSB dan penggulungan CCSB berdiri pada kedudukan yang berbeza. Dalam penggulungan dan permohonan arahan, isu keberhutangan CCSB dan pengagihan lebihan bersih kepada penama UOB akan diselesaikan. Saman USSB berkenaan keberhutangan USSB kepada UOB berkaitan perjanjian pinjaman dan debentur. CCSB bukan pihak dalam perjanjian pinjaman dan debentur. Malah CCSB dan pelikuidasinya telah memplid dalam pembelaan mereka terhadap saman USSB mereka adalah defendan nominal. Selanjutnya, penerimaan kepada bidang kuasa mestilah dengan persetujuan yang jelas dan tidak berbelah bahagi (lihat perenggan 41–42 & 44–45).

(3) Semua defendan tidak mempunyai sebarang bantahan terhadap permohonan penangguhan selain Equiticorp. Equiticorp ketika itu merupakan pemiutang tidak bercagar CCSB dan hutang telah dibayar sepenuhnya oleh pelikuidasi CCSB. Oleh itu semua defendan dalam saman USSB tidak boleh dikatakan diprejudis dengan tidak menjadi pihak dalam OS Singapura. Pertikaian dalam OS Singapura dan saman USSB hanya melibatkan USSB dan UOB dan bukan defendan lain dalam saman USSB kerana mereka bukan pihak dalam perjanjian pinjaman dan debentur. Oleh itu, penangguhan itu tidak mungkin memprejudiskan mereka, lebih-lebih lagi, disebabkan kedudukan yang mereka ambil (lihat perenggan 52–55).

(4) Walaupun OS Singapura tidak dapat dikuatkuasakan di Malaysia kerana ia merupakan penghakiman bukan kewangan, ia tidak boleh menafikan fakta bahawa penghakiman Singapura boleh diiktiraf oleh mahkamah di sini kerana klausa bidang kuasa eksklusif. Ini terutamanya apabila apa yang dipohon dalam OS adalah sama seperti dalam saman USSB. Klausa 25.2(c) perjanjian pinjaman menyatakan bahawa penghakiman muktamad mahkamah Singapura adalah konklusif dan mengikat dan hendaklah menjadi bukti konklusif tentang fakta dan jumlah keberhutangan USSB (lihat perenggan 56).]

Cases referred to

Adams and others v Cape Industries Plc and another [1990] Ch 433, CA (refd)
Continental Bank NA v Aeakos Compania Naviera SA and others [1994] 1 WLR 588, CA (refd)
Deutsche Bank AG v Sebastian Holdings Inc (No 2) [2011] 2 All ER (Comm) 245, CA (refd)
Donohue v Armco Inc and others [2001] UKHL 64, HL (refd)
Fiona Trust & Holding Corporation and others v Privalov and others [2007] 4 All ER 951, HL (refd)
Global Partners Fund Ltd v Babcock & Brown Ltd (in liq) [2010] NSWCA 196, SC (refd)
JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn

Bhd [2001] 2 Lloyd's Rep 41 (refd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1, FC (refd)
Rubin and another v Eurofinance SA and others; New Cap Reinsurance Corporation Ltd (in liquidation) and another v Grant and others (as members of Lloyd's syndicate 991 for the 1997 year of account) and another [2013] 1 All ER 521, SC (refd)
Spiliada Maritime Corp v Cansulex Ltd; The Spiliada [1986] 3 All ER 843, HL (refd)
Swiss Life AG v Kraus [2015] EWHC 2133 (QB), QBD (refd)
Vinmar Overseas (Singapore) Pte Ltd v Ptt International Trading Pte Ltd [2018] 2 SLR 1271; [2018] SGCA 65, CA (distd)
World Triathlon Corp v SRS Sports Centre Sdn Bhd [2018] MLJU 1466; [2019] 1 CLJ 381, CA (refd)

Legislation referred to

Companies Act 1965 s 237(3)
Rules of Court 2012 O 12 r 10(2)

Appeal from: Suit No WA-22NCC-682–12 of 2019 (High Court, Kuala Lumpur)

Yoong Sin Min (Poh Choo Hoo and Choy Kay Chun with her) (Shook Lin & Bok) for the appellant and second respondent.
P Gananathan (Tan Li Chie with him) (Gananathan Loh) for the first respondent.
Hoi Jack S'ng (Chew Mei Yng with him) (Lee Hishammudin Allen & Glendhill) for the third, fourth and fifth respondents.
Ng Sai Yeang (Teoh Chye Yi with her) (Raja, Darryl & Loh) for the sixth respondent.
K Shanti Moganasundram (Liew Seong Yee with her) (Shearn Delamore & Co) for the seventh respondent.

See Mee Chun JCA:

INTRODUCTION

[1] This is an appeal by the appellant, United Overseas Bank Ltd Singapore ('UOB') against the decision of the learned High Court judge ('HCJ'). The HCJ had dismissed its application for a stay of the High Court proceedings ('the USSB suit') filed by the first respondent ('USSB') pending the final disposal of an originating summons filed by UOB in Singapore ('Singapore OS').

[2] We had allowed the appeal and our reasons are as follows.

[3] The stay proceedings was premised on O 12 r 10(2) of the Rules of Court 2012 ('the RC 2012') on the ground that Malaysia is not the proper forum for the dispute, rather it is Singapore.

PARTIES

[4] The parties in the appeal will be referred to as follows-

(a) UOB (the appellant);

(b) USSB (the first respondent);

(c) UOB nominees (the second respondent);

(d) CCSB (the third respondent) and its liquidators, the fourth and fifth respondents;

(e) USSB's receiver (the sixth respondent); and

(f) Equiticorp (the seventh respondent).

BACKGROUND FACTS

[5] Pursuant to a loan agreement dated 17 December 1982 ('the loan agreement'), UOB granted a loan to USSB in US Dollars 18,700,000,00 ('the loan'). The loan was disbursed in US Dollars and duly utilised. As security for the loan, USSB granted a deed of debenture dated 17 December 1982 ('the debenture') charging all of its assets to UOB. The assets included all of USSB's 2,500,000 ordinary shares in CCSB then known as City Centre Bhd ('the CCSB shares'). The CCSB shares were registered in UOB nominees as required under the debenture.

[6] USSB defaulted in repayment of the loan. On 3 May 1985 UOB exercised its rights under the debenture and appointed receivers over the charged assets of USSB. USSB was wound up on 30 January 2007.

[7] CCSB too was wound up on 25 April 2000. CCSB had 16 parcels of land (the CCSB lands) which were eventually sold for RM516,275,200 by the liquidators. There was a liquidation surplus of RM434m ('surplus proceeds'). On 18 September 2017 the CCSB liquidators filed an Application for Directions under s 237(3) of the Companies Act 1965 on the distribution of the surplus proceeds, namely whether UOB nominees was the sole contributory of CCSB and if affirmative whether the surplus proceeds may be forwarded to it to apply the surplus based on the legal entitlement under the relevant security documents.

[8] The respondents to the application for directions were UOB nominees,

USSB and Equiticorp. It is to be noted that USSB and Equiticorp were then unsecured creditors of CCSB and it is not disputed the debts have been fully paid by the CCSB liquidators.

[9] On 12 February 2018 the High Court directed the surplus proceeds to be paid to UOB nominees. USSB and Equiticorp appealed to the Court of Appeal which allowed the appeal on 21 February 2019. Leave to the Federal Court was refused on 17 October 2019.

[10] On 9 December 2019 this USSB suit was filed. It essentially sought declarations the surplus assets do not form part of the assets of USSB subject to the loan agreement and/or the debenture; UOB and/or UOB nominees have not established a legal entitlement to the surplus proceeds, UOB nominees was not a contributory of CCSB such as to be eligible to receive the surplus proceeds without establishing a legal entitlement to the same and other consequential relief.

[11] On 21 April 2020 UOB filed its Singapore OS. It essentially sought orders and/or reliefs that under Singapore law all UOB's rights under the debenture are valid and exercisable including its security over all rights attached to the shares of City Centre Sdn Bhd; and under Singapore law UOB's security over all rights attached to the shares of City Centre Sdn Bhd pursuant to the debenture includes security over the right to the surplus proceeds.

[12] Then came the stay application by UOB.

FINDING OF THE HIGH COURT

[13] The HCJ found that UOB had submitted to the jurisdiction of the Malaysian courts. This was because it had participated in the winding up proceedings of CCSB through UOB nominees where the questions posed in the application for directions effectively relate to UOB's interest in the surplus proceeds.

[14] On the jurisdiction clause in cl 25 of the loan agreement, the HCJ found it to be intended to be operative in an action commenced by UOB against USSB. Since it was USSB which had first commenced proceedings there was no issue of USSB breaching the jurisdiction clause. There was nothing in that clause imposing an obligation on USSB to pursue its action in relation to the loan agreement and the debenture against UOB in Singapore. It followed that the general law in respect of *forum non conveniens* would be applicable and the factors laid out in *Spiliada Maritime Corp v Cansulex Ltd; The Spiliada* [1986] 3 All ER 843 would be considered to determine the appropriate forum.

A UOB'S SUBMISSION

[15] It was submitted by UOB that the jurisdiction clause in the loan agreement expressly provides for the exclusive jurisdiction to determine the disputes between the parties and that would be Singapore as the *forum conveniens*. USSB was obliged to resort to the Singapore courts, including commencing the USSB suit in Singapore. It is USSB that bears the burden to show strong or exceptional reasons as to why the Malaysian courts should condone the breach by USSB in allowing it to continue with the USSB suit. As the burden was not discharged, the USSB suit ought to be stayed.

[16] Furthermore, there was no submission to the jurisdiction of the Malaysian courts where it had not participated in the winding up proceedings of CCSB.

D USSB'S SUBMISSION

[17] It was submitted by USSB the jurisdiction clause was non exclusive such that there had been no breach of such clause. Even if the jurisdiction clause could be treated as an exclusive clause there was no meeting of minds in the present situation as per the HCJ finding. Given the non applicability of the jurisdiction clause by reason of UOB's submission to jurisdiction and that it did not apply to the USSB suit, it was UOB that had the burden to show that Singapore is the more appropriate forum. In actual fact, Malaysia is the more appropriate forum for the interests of all parties.

OUR DECISION WHETHER CL 25 AN EXCLUSIVE JURISDICTION CLAUSE

[18] We started by looking at the applicable law in the loan agreement and the debenture in relation to the dispute between UOB and USSB. In this regard the relevant clause is cl 25 which is set out in part as below:

> 25.1 This Agreement and the Debenture shall be governed by and construed in all respects in accordance with the laws of Singapore.
>
> 25.2 The Borrower hereby irrevocably agrees that any legal action or proceedings against it with respect to this Agreement and the Debenture may be brought in the courts of Singapore and the Borrower hereby —
>
> (a) irrevocably submits ... and unconditionally to the non exclusive jurisdiction of the aforesaid courts ...;
>
> (b) irrevocably appoints Khatter Wong & Partners ... as its agents to receive service of process in Singapore;

(c) ... agrees that a final judgment ... shall be conclusive and binding upon the Borrower ... shall be conclusive evidence of the fact and of the amount of the Borrower's indebtedness.

25.5 Nothing in this Clause shall limit the right of the Bank to bring any proceedings with respect to this Agreement and the Security Documents against the Borrower in any court elsewhere.

25.6 The Borrower hereby irrevocably waives any objection which it may now or hereafter have to the venue of any suit, action or proceeding arising out of or relating to this Agreement and Security Documents selected by the Bank and hereby irrevocably waives any claim that the venue so selected is not a convenient forum for any suit, action or proceeding.

[19] From cl 25.1 it is clear that Singapore law applies to any dispute relating to the loan and debenture.

[20] Moving on to the forum, the words in cl 25.2 would point towards USSB submitting to the non exclusive jurisdiction of the Singapore courts. However, the use of such phraseology does not mean the jurisdiction of the Singapore courts is necessarily non exclusive. We were in agreement with the rationale behind a non exclusive jurisdiction clause as explained by Richard Fentiman in *When Non-Exclusive Means Exclusive,* The Cambridge Law Journal, Jul, 1992, Vol 51, No 2 at pp 234–235 as follows:

In loan agreements, to take one example, jurisdiction clauses are drafted, from the lender's viewpoint, with two main aims in mind: first, to ensure that the borrower cannot challenge the jurisdiction of the lender's preferred forum; and secondly, to give the lender the maximum freedom to sue elsewhere as well, normally in pursuit of the borrower's assets ... An express submission to the non-exclusive jurisdiction of the English courts was usually adequate ... to secure English jurisdiction.

...

Secondly, as long as the parties agree to English jurisdiction the language in which they express themselves is irrelevant. A non-exclusive jurisdiction agreement is still a jurisdiction agreement.

...

If an agreement to English jurisdiction exists, it should not matter whether it is exclusive or non-exclusive in form, or simply undesignated.

[21] Case law too supports such an understanding. In *JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd* [2001] 2 Lloyd's Rep 41 it was held at p 45 as follows:

43. For the present purposes I see no difference between an exclusive and a non-exclusive jurisdiction clause. The difference between the two in principle is that, in the former case both parties are contractually bound to the chosen forum

whereas in the latter case it is only the defendant who is so bound.

[22] Extrapolating the above two points, we were therefore inclined towards the interpretation that the non exclusive jurisdiction clause meant that only UOB has the option to refer to other jurisdictions but not USSB. Such an interpretation is fortified by cl 25.6 of the loan agreement where if UOB has selected Singapore as the forum, USSB irrevocably waives any claim that the venue so selected is not a convenient forum.

[23] In *Continental Bank NA v Aeakos Compania Naviera SA and others* [1994] 1 WLR 588, the English Court of Appeal had occasion to consider a jurisdiction clause similar to the instant appeal. That clause provided at pp 591–592 as follows:

> 21.01 This agreement shall be governed by and construed in accordance with English law.
>
> 21.02 Each of the borrowers ... hereby irrevocably submits to the jurisdiction of the English courts and hereby irrevocably nominates Messrs, Aegis (London) Ltd of 197, Knightsbridge, London, SW7, England to receive service of proceedings in such courts on its behalf but the bank reserves the right to proceed under this agreement in the courts of any other country claiming or having jurisdiction in respect thereof.

At pages 593 and 594 it was then stated:

> Does clause 21.02 contain an exclusive jurisdiction clause? Clause 21.02 does not expressly make clear that the jurisdiction agreement is an exclusive one, Dicey & Morris, The Conflict of Laws, 12th ed. (1993), vol.1,p.422, submits that the question is simply whether on its true construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used ... In our judgement it would be as surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen court is to be the exclusive forum.
>
> ...
>
> We regard the concluding words as significant: 'but the bank reserves the right to proceed under this agreement in the courts of any other country claiming or having jurisdiction in respect thereof'. The juxtaposition of a submission by the defendants to the jurisdiction of the English courts and the option reserved in favour of the bank to sue elsewhere brings into play the *expressio unius exclusio alterius* canon of construction. It suggests that a similar option in favour of the defendants was deliberately omitted. In our judgement the language of clause 21.02 evinces a clear intention that the defendants, but not the bank, would be obliged to submit disputes in connection with the loan facility to the English courts.

[24] This essentially meant that absent the words 'exclusive jurisdiction' did not necessarily mean the (English) courts did not have exclusive jurisdiction. This was because the juxtaposition of submission by the defendants to the

jurisdiction of the English courts and the option to the bank to sue elsewhere suggested a similar option in favour of the defendants was intentionally omitted. This meant a clear intention that the defendants but not the bank would be obliged to submit its dispute to the (English) courts.

[25] This would be the position in this instant appeal where UOB has the option to sue elsewhere but not USSB. This drives home the point that such an option was intentionally omitted from USSB which entailed it being obligated to refer to the Singapore courts.

[26] The following reasons further supports the above position.Singapore law is the governing law (cl 25.1); USSB irrevocably and unconditionally submitted to the non exclusive jurisdiction of the Singapore courts (cl 25.2(a)); USSB irrevocably appointed a Singapore based firm as its agent to receive service of process in Singapore (cl 25.2(b)); USSB agreed that a Singapore judgment shall be conclusive and binding upon it of the facts and the amount of indebtedness (cl 25.2(c)); USSB agreed that the right of UOB to bring any proceedings relating to the loan agreement and the debenture in any court elsewhere was not limited by cl 25 (cl 25.5); and USSB agreed that if UOB were to select the Singapore courts as the forum, it would irrevocably waive any objections on the ground that the Singapore courts are *forum non conveniens* (cl 25.6).

[27] In *Deutsche Bank AG v Sebastian Holdings Inc (No 2)* [2011] 2 All ER (Comm) 245 it was stated at p 256 that 'in construing a jurisdiction clause, a broad and purposive approach must be followed'.

[28] The Australian Court of Appeal in *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196 had this to say:

> [67] A significant purpose of an exclusive jurisdiction clause is to ensure that all disputes are determined in a coherent manner by a single jurisdiction. There is a clear commercial interest in minimising the possibility of a dispute being determined by multiple tribunals, with the consequent prospect of divergent findings. Furthermore, the parties, in advance, have determined that a particular jurisdiction is acceptable to them, both in terms of the speed and efficacy of its civil dispute resolution procedures and for the competence and skill of its judges and lawyers. A party to such a clause should be held to its contractual obligations, whether enforced by another party on a contractual basis or by means of the exercise of a discretion conferred upon the court.

[29] Refer also to *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 4 All ER 951 at p 962 where the sensible commercial presumption is that parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places.

[30] Under these circumstances the HCJ was wrong to conclude that 'UOB's reliance on the exclusive jurisdiction clause is misplaced as the exclusive jurisdiction clause does not concern an action commenced by USSB against UOB. The exclusive jurisdiction clause has no force in a situation where USSB sues UOB Singapore as there is nothing to indicate the meeting of minds of the parties in respect of such a situation' (para 80 of grounds). The meeting of the minds arises from the juxtaposition of submission by USSB to the jurisdiction of the Singapore courts and the option to UOB to sue elsewhere which suggested a clear intention that USSB but not UOB would be obliged to submit its dispute to the Singapore courts, as per *Continental Bank NA*.

[31] In para 81 the HCJ went on to state that an exclusive jurisdiction clause may still be incorporated if UOB can show there is a good arguable case that such an agreement exists between parties. *Vinmar Overseas (Singapore) Pte Ltd v Ptt International Trading Pte Ltd* [2018] 2 SLR 1271; [2018] SGCA 65 was referred to as an illustration. The reference to *Vinmar* can be distinguished where in that main contract there was no exclusive jurisdiction clause unlike this instant where we have found cl 25 to be an exclusive jurisdiction clause.

[32] There being an exclusive jurisdiction clause, it is USSB that bears the burden to show strong reasons why it ought to be allowed to continue with the USSB suit. There is no necessity to go the route of *Spiliada* on *forum conveniens*.

[33] This was what was said by the English House of Lords in *Donohue v Armco Inc and others* [2001] UKHL 64 at p 759:

> [24] If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in the forum ... the general rule is clear; where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it.

[34] *Donohue* was followed by the Federal Court in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1. At p 25 it was stated:

> [52] Stating the matter very generally, in an application for injunction to restrain or stay arbitration proceedings, or for an anti-suit injunction which has the effect of preventing a party from bringing a claim in any forum other than the forum parties agree to submit, strong reasons are required to displace the contractual obligation

entered into in relation to an arbitration clause or an exclusive jurisdiction clause. Suffice if we refer to one leading English authority in support of this proposition. The decision of the House of Lords in the case of *Donohue v Armco Inc and others* [2002] 1 All ER (Comm) 97 bears out exactly the logical basis for the above proposition in the following passages ...

[35] Similarly in *World Triathlon Corp v SRS Sports Centre Sdn Bhd* [2018] MLJU 1466; [2019] 1 CLJ 381, the Court of Appeal had this to say at p 389:

[19] In the present appeal, just like the American Express case, the parties here had agreed to a foreign jurisdiction clause as well as to be governed not by the laws of Malaysia but by the laws of Florida/USA. Now, the law in relation to the exclusive jurisdiction or forum selection clause is not controversial. Although generally a forum selection clause does not oust the jurisdiction of the court, the court is nevertheless obliged to give effect to it as that is what the parties had agreed (see *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 1 LNS 31; [1976] 2 MLJ 154). Disregarding such a clause would effectively mean the courts condoning a breach of the agreement.

[36] In essence, the above cases would show the need to give effect to an exclusive jurisdiction clause and that to depart from it would be to condone the breach of an obligation such that USSB is required to show strong reasons for departing from it.

[37] *World Triathlon Corp* at p 390 had also stated that:

[23] In our view, these considerations accepted by the learned judge are insufficient to override the exclusive jurisdiction clause. More is required as the parties had willingly and contractually agreed to the exclusive jurisdiction clause as well as the laws of Florida/USA as the law of choice for the litigation. The respondent must show more than just inconvenience to witnesses and cost of litigation. Practical inconvenience is not a determinative factor. What matters most is the suitability of the forum which will meet the ends of justice.

...

[25] In any case, having agreed to submit to the jurisdiction of the Courts of Florida/USA, it is not open to the respondent to now complain about inconvenience and cost as these were also matters which could have been foreseen at the time of entering into the agreement.

[38] Thus the factors in *Spiliada* do not amount to strong reasons in the face of an exclusive jurisdiction clause.

[39] Clause 25 being an exclusive jurisdiction clause and the waiver of objection to Singapore as the proper forum to hear any dispute would for all intent and purpose make it clear that as a matter of contractual obligation, the submission to the jurisdiction of the Singapore courts should not be

challenged. We also considered that the Singapore courts in applying the law of the contract which is the laws of Singapore would be best positioned to hear the dispute.

[40] To wrap up on this issue, reference again is made to *World Triathlon Corp* at p 390:

> So, to surmise, where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction.

WHETHER UOB SUBMITTED TO THE MALAYSIAN COURTS JURISDICTION THROUGH UOB NOMINEES

[41] The HCJ found that UOB had submitted to the jurisdiction of the Malaysian courts in CCSB's winding up proceedings through UOB nominees.

[42] We note however that in the application for directions filed by CCSB liquidators was served on UOB nominees as a respondent following from which UOB nominees was compelled to defend its right, as the sole shareholder/contributory of CCSB, to the surplus proceeds. The affidavit filed by the Senior Vice President UOB was in the context of UOB nominees' opposition to USSB's application to stay the High Court directions that the surplus proceeds be paid to UOB nominees and nothing more. Even if UOB nominees had transferred the RM240m it received to UOB, this did not amount to UOB having participated in CCSB's winding up proceedings through UOB nominees.

[43] The Court of Appeal in the application for directions had considered too that UOB was not a party to the proceedings. In para 100 of its grounds it stated that certain observations were made without the benefit of certain parties before them especially UOB.

[44] The USSB suit and the CCSB winding up stands on different footing. In the winding up and the application for directions, the issue of CCSB indebtedness and the distribution of the surplus proceeds to UOB nominees is to be resolved. The USSB suit concerns USSB indebtedness to UOB vis a vis the loan agreement and the debenture. It cannot be gainsaid that CCSB is not a party to the loan agreement and the debenture. In fact CCSB and its liquidators have pleaded in their defence to the USSB suit they are nominal defendants.

[45] Further, submission to jurisdiction must be by a clear and unequivocal consent. *Adams and others v Cape Industries Plc and another* [1990] Ch 433 is authority for such proposition. This was a case when a consent order was recorded and subsequently another group of workers sued on the same cause of action. In the second suit, Cape Industries did not defend the action on the basis of the American courts having no jurisdiction. Default judgement was obtained. Proceedings were commenced in England to enforce the default judgment and the objection by Cape Industries was it did not submit to American jurisdiction in the second suit. At p 462 the Court of Appeal there stated:

> ... Where steps taken in proceedings are being examined in the context of an alleged submission to the jurisdiction, what is being sought is evidence of consent on the part of defendant to the exercise by the court of jurisdiction over him ...

[46] *Rubin and another v Eurofinance SA and others; New Cap Reinsurance Corporation Ltd (in liquidation) and another v Grant and others (as members of Lloyd's syndicate 991 for the 1997 year of account) and another* [2013] 1 All ER 521 referred to by USSB was an instance where proof of debt, participation in creditors meeting and receipt of dividends were held to be submission to jurisdiction. Quite apart from it concerning internal insolvency proceedings as opposed to civil proceedings in the form of the USSB suit and the Singapore suit, there was never any proof of debt filed by UOB in the winding up proceedings.

[47] The reliance on *Swiss Life AG v Moses Kraus* [2015] EWHC 2133 (QB) that the submission to jurisdiction extends to related matters must be viewed in the light of *Adams* where there must be evidence of consent even when there the two causes of action were the same.

GROUNDS OF THE COURT OF APPEAL DATED 7 AUGUST 2019

[48] These grounds were in relation to the application for directions filed by the CCSB liquidators on the distribution of the surplus proceeds.

[49] As noted earlier, UOB was not a party to those proceedings and the USSB suit and the CCSB winding up stands on different footing. It follows therefore that those grounds cannot have any effect on the USSB suit. In fact, in para 91 of the grounds it was stated that 'these matters ought to be dealt with in or through separate proceedings, initiated by the appropriate parties, whether UOB nominees, USSB or Equiticorp or even UOB Singapore'.

[50] Further the Court of Appeal then was mindful too in para 100 of its grounds that certain observations were made without the benefit of certain parties before them especially UOB Singapore.

[51] There was also never any issue as to the *forum conveniens* of the dispute.

POSITION OF THE OTHER DEFENDANTS/RESPONDENTS

[52] All the defendants did not have any objection to the stay application other than Equiticorp. In this appeal too, the CCSB liquidators take a neutral position while USSB's receiver supports it. Equiticorp's application to intervene in the USSB suit was allowed by the HCJ and on appeal to this court, was allowed, such that it no longer remains a party. Equiticorp has filed an application for leave to the Federal Court.

[53] It bears reminding that Equiticorp was then an unsecured creditor of CCSB and it is not disputed the debts have been fully paid by the CCSB liquidators.

[54] Hence all defendants in the USSB suit cannot be said to be prejudiced by not being made parties to the Singapore OS.

[55] The disputes in the Singapore OS and the USSB suit only concern USSB and UOB and not the other defendants in the USSB suit as they are not parties to the loan agreement and the debenture. Hence the stay cannot possibly prejudice them, more so due to the position taken by them, as stated earlier.

EFFECT OF THE SINGAPORE OS

[56] Even if the Singapore OS cannot be enforced in Malaysia due to it being a non monetary judgment, it cannot negate the fact that the Singapore judgment can be recognized by the courts here due to the exclusive jurisdiction clause. This is particularly so where what is being sought in the OS are the same as that in USSB suit. To recap, cl 25.2(c) of the loan agreement provides USSB's agreement that a final judgment of the Singapore court shall be conclusive and binding upon it and shall be conclusive evidence of the fact and of the amount of USSB's indebtedness.

CONCLUSION

[57] For the above reasons we found merits in the appeal and allowed the stay of proceedings.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh